

(7)

THE COURT: May it be said that your express desire to plead guilty to each of the three charges that you have responded to here is a voluntary plea?

DEFENDANT DENEEN: Yes, your Honor.

THE COURT: Is it of your own free will act?

DEFENDANT DENEEN: Yes, your Honor.

THE COURT: What understandings are there here, Mr. Palus, in this case?

MR. PALUS: It's our understanding that the Defendant will plead in Case Number G81-33 to Counts 3 and 11, and in Case Number G81-97, to Count 1. In exchange for that, after he is sentenced on his plea-based conviction the Government in G81-33 will move to dismiss the other 15 counts, and in G81-97, will move to dismiss Count 2 through 4.

THE COURT: Is that correct, Mr. Kalliel?

MR. KALLIEL: Those counts are to be dismissed as a part of the plea bargain.

MR. PALUS: It's also a part of the plea agreement as we understand it, your Honor, that the Government has agreed that it will take no position regarding the sentence to be imposed by the Court upon Mr. Deneen.

THE COURT: Is that correct, Mr. Kalliel?

MR. KALLIEL: That's correct.

Excerpt from Sentencing Transcript of November 9, 1981

(6)

* * * presentence, to give you my views about Mr. Deneen, to deal with the aspects of publicity he's received, letters that the Court referred to, his plan of rehabilitation, to go over his history, the histories of his family, from childhood until the present time, to also give you the reasons why Mr. Deneen became involved in this situation, and to express to you his feeling and gratitude in a way, that it's all over, that he does not have to anymore play this role that he found himself involved in, and got himself involved in. We went over all those things, and I, on behalf of Mr. Deneen, and I have told him that we have done this, express our gratitude to the Court for having had that kind of an informal, if you will, official discussion, so at least we feel that we have told you everything we can to help Mr. Deneen, carry out our duties as attorneys in this community.

THE COURT: I believe at the discussion this morning in chambers, that Mr. Palus was not heard, is that correct, Mr. Palus?

MR. PALUS: That's right, your Honor.

THE COURT: And is that part and parcel of some understanding or arrangement that you have had?

MR. PALUS: Yes, your Honor. It was part of the plea agreement that the Government would make no comment or recommendation regarding sentence.

Memorandum in Opposition

**UNITED STATES OF AMERICA
IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

Case No. G 81-33 Cr.

GARY WAYNE DENEEN,
Defendant.

**MEMORANDUM IN OPPOSITION TO
MOTION FOR SENTENCE REDUCTION**

On or about November 19, 1981, Defendant filed a Motion for Sentence Reduction. Defendant has filed affidavits which suggest his sentence should be reduced because his family will suffer hardships, his business enterprises will be affected, and legal suits require his presence. The government submits such reasons are not sufficient to require the relief requested.

A Fed. R. Crim. P. 35 Motion is addressed to the sound discretion of the trial judge. The only limitations on that discretion are that the sentence not be illegal and the denial not be a gross abuse of discretion. *United States v. Nerren*, 613 F.2d 572, 573 (5th Cir. 1980); *United States v. Muniz*, 571 F.2d 1344, 1345 (5th Cir. 1978).

A sentence which is within the statutory limits is neither illegal nor an abuse of discretion. *United States v. Combie*, 569, F.2d 273, 274-275 (5th Cir. 1978); *United States v. Donner*, 528 F.2d 276, 278-280 (7th Cir. 1976).

It is unfortunate that Defendant's business will be affected. It is sad that his family will be disrupted. These

Memorandum in Opposition

matters do not, however, remove the fact of what defendant has done.

In *Donner, supra*, the named defendant had broken into a Selective Service office and destroyed records. By the time of sentencing he had become rehabilitated and was working for the Divine Light Mission. 528 F.2d 280. The Appellate Court while upholding a denial of probation stated, at 528 F.2d 230:

Carlyle tells us that of all acts of man, repentance of one's past deeds and the shaping of future efforts to offset evil by positive good is most divine. But even the truest repentance and most positive efforts to offset prior evil do not carry forgiveness of punishment. Its want emboldens lawlessness and entices others to join in lawbreaking. Crime must have its punishment lest it encourage licentiousness.

Similarly in this case, business and family problems do not offset prior evil, they do not carry forgiveness of punishment. Especially, in a case such as this, to relieve the defendant of his punishment might embolden others similarly situate to continue and begin criminal activity without fear of punishment.

Just as in *Donner, supra*:

... the offense here is an insolent challenge to the integrity of the processes of our government itself—the warp and woof of any free society. To let such an offense go unpunished would be a direct affront to the governmental system. We cannot say in the light of these circumstances that the refusal to grant probation was an abuse of discretion. 528 F.2d 280.

This Honorable Court has already seen fit to show mercy by its sentence. Defendant is not entitled to more.

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Memorandum in Opposition

For all these reasons, the relief requested by defendant should be denied.

Respectfully submitted,

JOHN A. SMETANKA

United States Attorney

By Martin F. Palus

Assistant United States Attorney

544 Federal Building

Grand Rapids, MI 49503

(616) 456-2404

Dated: November 27, 1981

*Excerpt from Prosecutor's Comments
Hearing of November 27, 1981*

**EXCERPT FROM PROSECUTOR'S COMMENTS AT
SENTENCE REDUCTION HEARING OF
NOVEMBER 27, 1981**

(74)

* * *

MR. PALUS: I just have some brief comments to make, your Honor. As the Court knows, we did not make any recommendation or any arguments concerning the sentence when it was imposed as part of our agreement for the plea. However, this Court received the presentence report, and the input of the defense in that presentence report prior to imposing the sentence which has been imposed, which as the Court knows is quite a bit less than the maximum that could have been imposed on Mr. Deneen. Your Honor, I don't think that by having this hearing, by submitting the affidavits, Defendant has added anything to the concerns and ideas and rationales that were presented to the Court at the time of the sentencing. It is true that his family will be disrupted if he goes to prison. It happens to anyone who has a family that gets sentenced to prison. It is true his business would be affected if (75) he goes to prison. That is true of anybody who commits a crime and is sentenced to prison who has a business, and it seems, your Honor, that in all of this presentation by the Defendant, it's always somebody else's fault. It's always the Mikes' who got him into this. It's always the finance companies that make it so easy, and now if he goes to prison because of what he has done, it's the Court's fault for not putting him on probation as he would like to be.

But, it is in fact no one's fault but Mr. Deneen's. Mr. Deneen freely lied, cheated and stole, and he's sorry for that now, and as we point out in our brief in the Donner case, your Honor, as the Court knows Mr. Donner had done a complete turn around in his life. He went from a anti-social revolutionary to sacrificing his life for his fellow man at the Divine Mission. In that case, the trial court saw

*Excerpt from Prosecutor's Comments
Hearing of November 27, 1981*

fit to sentence him to three years imprisonment for what he had done. He appealed saying he should have had probation, and the appellate court pointed out that it is indeed almost divine to feel repentance and to try to undo the evil you had done, and then pointed out, "But even if the truest repentance and most positive efforts to offset prior evil do not carry forgiveness of punishment. Its want emboldens lawlessness and entices others to join in lawbreaking. Crime must (76) have its punishment lest it encourage licentiousness." In this case, I think this Court considered all the requests and concerns of the defense, and also considered the Donner cloak when it sentenced Mr. Deneen, and we would suggest to the Court that defense has not presented anything to the Court to change that, or it has already shown to Mr. Deneen mercy when it originally imposed the sentence, and we suggest to the Court that it is a legal sentence, and that it should remain.

*Excerpt from Findings and Decision
Hearing of November 27, 1981*

**EXCERPT FROM DISTRICT COURT JUDGE'S
FINDINGS AND DECISION AT SENTENCE REDUCTION
HEARING OF NOVEMBER 27, 1981**

(85)

* * * but I don't give it a lot of points either.

There is really no way that Gary Deneen can ever pay back what has happened. The United States Attorney has put his finger on it, for what he has done to his family, and when we get to a place in life where we command the respect of many other people, there is an added obligation on us, or when we deal in hundreds of thousands of dollars, and when we have employees, we stop and think before we take action. This is expected of us. What has been done can never be paid back. The cost to the Government and the federal bankruptcy judge and the Court, the officials, the 23 Grand Jurors who met in this case, gave up a portion of their lives and their money and their days on the job, and otherwise to come and hear this matter; FBI agents who were employed over many, many days in its investigation; probation officers who were kept busy in this Court; the United States Attorneys who are involved in this. This Court has spent a considerable, I should not say an inordinate amount of time, because there is no case in which—criminal case that I would call an inordinate amount of time, but if we were to have to calculate the cost that have already gone to the United States Government in this case, would be in excess of \$25,000, and that will not be paid back, that will be paid by and is paid by the taxpayers of this country. Those are but a * * *

*Order Denying Reduction of Sentence
Filed December 7, 1981*

**DISTRICT COURT ORDER
DENYING REDUCTION OF SENTENCE
DATED DECEMBER 7, 1981**

On November 9, 1981, following a plea of guilty in Case No. G81-33 CR to charges of mail fraud in violation of 18 U.S.C. § 1341 (Count 3) and interstate transportation of stolen property in violation of 18 U.S.C. §§ 2314 and 2 (Count 11), defendant was sentenced to a term of five years on Count 3 and nine years on Count 11.

On the same day, following a plea of guilty in Case No. G81-97 CR to a charge of interstate transportation of stolen property (Count 1) in violation of 18 U.S.C. § 2314, defendant was sentenced to a term of nine years.

All sentences were adjudged to run concurrently. The judgments further provided that defendant was to report to the designated institution for commencement of his sentences on November 30, 1981.

Defendant has now moved for a reduction of sentence in each of these cases under the provisions of Rule 35 of the Federal Rules of Criminal Procedure. The court has duly considered the motions, the memoranda, and the affidavits filed in support thereof. The court concludes that a reduction of sentences previously imposed is not warranted. The motions to reduce the sentences are therefore denied.

IT IS SO ORDERED.

Dated: November 27, 1981

(s) Wendell A. Miles
Judge, United States District Court

Order Filed September 17, 1982

**ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS
DATED SEPTEMBER 17, 1982**

(Filed: September 17, 1982)

Before: EDWARDS, Chief Judge; ENGEL, Circuit Judge;
and HOFFMAN, Senior District Judge*

Appellant Gary Wayne Deneen appeals from a decision of the district court denying his motion made under Rule 35 of the Federal Rules of Criminal Procedure. Deneen had been the subject of a 17-count indictment by a grand jury from the Western District of Michigan and a 4-count indictment entered by a grand jury for the Eastern District of Wisconsin. Following transfer of the Wisconsin case to the Western District of Michigan pursuant to Federal Rule of Criminal Procedure 20, Deneen pled guilty to one count each of mail fraud, interstate transportation of stolen money and securities, and interstate transportation of falsely made, forged, altered or counterfeit securities. In exchange for the guilty pleas, the government agreed to dismiss the remaining counts and to take no position regarding the sentence to be imposed. The district court sentenced Deneen to concurrent terms on the three counts of five years, nine years, and nine years, respectively. Deneen then moved for a Rule 35 hearing to reduce sentence. At the Rule 35 hearing, the government suggested that Deneen's sentence remain the same and commented on his character and prior acts. Following denial of his motion to reduce sentence, Deneen filed a notice of appeal.

Deneen relies upon the unpublished decision of this court in *Angus v. United States*, No. 80-5005 (6th Cir. February 17, 1981), as authority that the government's comments at the Rule 35 hearing amounted to a violation of its plea bargain and required a vacation of the judgment of the district court and a remand for resubmission of his Rule 35 motion before a district judge. *Angus*, in turn, relied upon certain language employed in *United States v. Ewing*, 480 F.2d 1141 (5th Cir. 1973).

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Upon consideration the court finds *Angus v. United States, supra*, inapposite. In *Angus*, it was apparent that the government's plea bargain included an agreement not to oppose Angus' request for probation, a bargain it failed to keep when it, in fact, opposed Angus' request for probation at the Rule 35 hearing. Here, the sole promise of the government respecting the sentence was that it would "take no position regarding the sentence to be imposed." The court considers that the government kept its bargain, and while perhaps it could have agreed not to comment at any post-sentence proceedings, there was no evidence that it did in fact do so. In the absence of such a specific agreement, the government retained the freedom to comment as it did. Accordingly,

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

Order Filed September 17, 1982

Re: Nos. 81-1763/1764

United States of America v. Gary Wayne Deneen

HOFFMAN, Senior District Judge, concurring specially.

While I concur in the order in the above cases, I write separately to express my views because of the interaction of Rule 35 with Rule 11, and my concern as to the unpublished opinion of this court in *Angus v. United States*, No. 80-5005, decided February 17, 1981.

A review of the briefs in *Angus* will demonstrate why the court decided to rely upon *United States v. Ewing*, 480 F.2d 1141 (5th Cir. 1973). *Angus* involved a plea agreement wherein Angus agreed to plead guilty to conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846. The Government, on its part, agreed to move to dismiss the remaining ten counts, that it would not oppose a probationary sentence, and would also agree that Angus receive *no more than* six years incarceration under 18 U.S.C. § 4205(b)(2). On November 11, 1977, Angus was sentenced to a term of six years under § 4205(b)(2), with a special parole term of three years.¹ At the sentencing hearing, the Government fully complied with its agreement. Angus thereafter appealed with this court affirming the conviction and certiorari being denied.

Approximately twenty months after sentence was imposed, Angus filed his first Rule 35 motion to reduce his sentence, said motion being timely filed within 120 days from the denial of the petition for a writ of certiorari. The Government responded, opposing any reduction of sentence and any stay of execution because "it is highly unlikely that the balance of the present motion will result in a probationary sentence for the defendant." Thereafter, the district judge reduced the sentence to four years under 18 U.S.C. § 4205(b)(2).

¹ The special parole term was rendered nugatory under *Bifulco v. United States*, 447 U.S. 381 (1980), although the *Angus* unpublished opinion fails to mention *Bifulco*.

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Angus then filed a further motion to reduce the sentence and contended that the Government violated the plea agreement by opposing the initial Rule 35 motion, relying entirely upon *Santobello v. New York*, 404 U.S. 257 (1971) (where the violation occurred at the sentencing hearing following the prosecutor's agreement to make no recommendation as to sentence but, at the sentencing hearing, the prosecutor recommended that the maximum sentence be imposed), and *United States v. Ewing*, 480 F.2d 1141 (5th Cir. 1973) (where the alleged violation occurred at a Rule 35 hearing) with the latter court stating:

The fact that the prosecution fulfilled its commitment at the initial sentencing only to breach it at the subsequent hearing on [a] motion for reduction of sentence . . . [is a] distinction of little import because *both of these proceedings were integral parts of the sentencing process in this case*. Surely when [he] obtained the Government's promise not to oppose probation in exchange for his plea of guilty, he did so in the expectation that the benefits of that promise would be available throughout the proceedings relevant to the determination of his sentence. (Emphasis supplied).

Ewing cites no authority for the proposition that a Rule 35 hearing is an integral part of the sentencing process. Indeed, it is *not* an integral part of the sentencing process, but *is* an integral part of the *post-sentencing remedies* made available under Rule 35(b). One need only consider the fact that, under a Rule 35(b) motion for reduction of sentence, there is no absolute right to a hearing as the motion is frequently considered by the judge informally and in chambers; a defendant has no constitutional right to be personally present or to be represented by counsel at any consideration of the motion. *United States v. Donohoe*, 458 F.2d 237 (10th Cir. 1972). Assuredly, the 120-day time limitation for filing a motion under Rule 35(b) does not run anew from any reduction of the sentence; it still commences at the

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time the sentence was imposed in the first instance. And, of course, an appeal may be immediately noted after sentence is imposed.

In *United States v. Behrens*, 375 U.S. 162 (1963), the Court discussed the relationship between Rule 35 and a sentence imposed under 18 U.S.C. § 4208(b) [now 18 U.S.C. § 4205(c)]. In *Behrens*, the district court first imposed a maximum sentence of 20 years to "be subject to modification in accordance with Title 18, U.S.C. § 4208(b)." After receipt of the report from the Director of the Bureau of Prisons, the district court entered an order providing "that the period of imprisonment heretofore imposed be reduced to Five (5) years", but neither the defendant nor his counsel was present when the modification order was entered. In considering the necessity of the defendant and his counsel to be present in a Rule 35 proceeding, Justice Black, speaking for the Court, said:

It is true that the same rule [Rule 43] provides that a defendant's presence is not required when his sentence is reduced under Rule 35. But a reduction of sentence under Rule 35 is quite different from the final determination under § 4208(b) of what a sentence is to be. Rule 35 refers to the power of a court to reduce a sentence which has already become final in every respect.

Thus, the *Behrens* court held that a defendant must be present at the time of final sentencing under § 4208(b), the Court also pointing out that a defendant has the right to speak in his own behalf under Rule 32(a) [now Rule 32(a)(1)] of the Federal Rules of Criminal Procedure. And in the companion case, *Corey v. United States*, 375 U.S. 169 (1963), decided the same day as *Behrens*, the Court reversed the Circuit Court of Appeals for the First Circuit, which had dismissed as untimely an appeal from the final sentence pursuant to § 4208(b) by holding that a timely notice of appeal could be filed, at the option of the defen-

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dant, after the initial sentence under § 4208(b), or after the final sentence subsequent to the receipt of the report from the Director of the Bureau of Prisons. While *Corey* did not discuss Rule 35, it does state what is meant by a final judgment where it says a "Final judgment in a criminal case . . . means sentence. The sentence is the judgment", citing *Berman v. United States*, 302 U.S. 211, 212 and *Korematsu v. United States*, 319 U.S. 432, 434.

Based upon these teachings, I respectfully disagree with the *Ewing* case, as well as the unpublished opinion in *Angus* which relies solely upon *Ewing*. However, in fairness to the *Angus* panel it should be noted that the Government conceded that it "did inadvertently oppose the Defendant's initial motion to reduce [the] sentence to probation", thus tacitly confessing error and without endeavoring to point out any error in the *Ewing* ruling despite the fact that *Ewing* had been criticized in the intervening period.

The Third Circuit, in *United States v. Ligori*, 658 F.2d 130 (1981) has expressly repudiated *Ewing*. The Seventh Circuit, in *United States v. Mooney*, 654 F.2d 482 (1981), has said: "In the absence of any indication that the parties expected the Government not to oppose a Rule 35 motion, we would hesitate to imply such a condition." *United States v. Arnett*, 628 F.2d 1162 (9th Cir. 1979), holds to this effect, although the case was remanded to the same trial judge to determine the dispute, if any, as to the terms of the plea agreement. The Second Circuit, in *Bergman v. Lefkowitz*, 569 F.2d 705 (1977), rejected the defendant's argument that the prosecution violated the plea agreement to recommend no additional sentence merely by opposing the motion to reduce the sentence. Even the Fifth Circuit has tempered its *Ewing* opinion in *United States v. Johnson*, 582 F.2d 335 (1978), by saying "*United States v. Ewing*, *supra*, does not give the defendant the right to present an unopposed Rule 35 motion. The government violates *Ewing*

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only when its opposition violates the essence of the plea bargain."

While I agree that some prosecutor could conceivably bargain not to oppose a Rule 35 motion, or a motion under 28 U.S.C. § 2255, and such an agreement could be upheld under *Santobello*, it stretches my imagination to say that, in a separate proceeding following final judgment from which an appeal can be noted forthwith, there can be a "silence forever" edict imposed upon the prosecution.

Rule 35 is now in the process of amendment by resolving a conflict in the circuits where the *execution* of the sentence has been suspended, the defendant placed on probation, and his probation is later revoked. The Second Circuit in *United States v. Kahane*, 527 F.2d 491 (1975), held that a Rule 35 motion filed after probation was revoked was untimely. The Third Circuit disagreed in *United States v. Johnson*, 634 F.2d 94 (1980), holding that the 120-day time limitation runs from the date of revocation of probation. If the views of the Advisory Committee on Criminal Rules are upheld, the amendment will agree with the Third Circuit and will thus permit a Rule 35 motion to be filed within 120 days from the date of revocation of probation. The effect of sustaining the *Ewing* ruling in this situation is significant. A prosecutor could agree not to make any recommendation as to the sentence to be imposed and adhere to that agreement at the time of sentencing. The district judge imposes a sentence, but suspends the execution of that sentence and places the defendant on probation for a given period of years not, of course, in excess of five. Within the time period of the probation, the defendant violates the terms of the probation and probation is revoked. He then, under the proposed amendment to Rule 35, files a motion for reduction of sentence. According to *Ewing* and *Angus*, the prosecutor is foreclosed from commenting as to whether the originally imposed sentence should be reduced. I cannot subscribe to sealing the lips of

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the prosecutor beyond the time that he committed himself to remain silent, or otherwise not to oppose a request for probation. A Rule 35(b) motion presupposes a valid sentence which is complete and final in every respect. Vo. 8A, Moore's Federal Practice, § 35.02[1].

The history of Rule 35 lends support to the conclusion that it is not an integral part of the sentencing process, but is indeed, a post-sentence remedy made available to a defendant if exercised within a specified number of days. To fix a definite time limitation which previously had fluctuated by reason of terms of court fixed by local rules was one of the primary reasons for what is now Rule 35. After the expiration of the term of court, there was no power to reduce a sentence prior to the passage of Rule 35. Once the service of the sentence had actually commenced, the right to modify the sentence no longer existed even during the same term of court. *United States v. Murray*, 275 U.S. 347, 358 (1928). Some local rules carried provisions for extending the terms of court, and these extension orders were frequently entered to permit judges to give further consideration to reducing sentences already imposed. There were, indeed, cogent reasons for adopting Rule 35 but, aside from the foregoing, the basic reasoning is set forth in Moore's Federal Practice, Vol. 8A, § 35.02[1], where it is said:

The psychological principle upon which the motion seems to be premised is that passage of time may find the sentencing judge in a more sympathetic or receptive frame of mind. This principle is likely to operate differently depending upon whether the sentence is imposed upon a plea of guilty or after trial. In the latter case the trial judge's reaction to defendant's alleged perjury on the stand, or to the fact that he went to trial at all, may moderate when the immediacy of the trial has faded.

Judges are human. On the day of sentencing he or she may have been ill or irritated by circumstances unrelated to the

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trial of a defendant. Rule 35(b) affords a judge an opportunity to reconsider his prior action. It is a separate but independent proceeding and any agreement by a prosecutor, unless expressly stated otherwise, should be limited to the original sentencing hearing.

In the case under consideration, the Rule 35 hearing was conducted under circumstances which brought forth no objection as to any participation or statement by the Assistant United States Attorney. No suggestion was made that the matter should be considered by another judge until appellant's brief on appeal was filed. The hearing on the motion reflected no possible bias or prejudice on the part of the judge. These factors alone would be sufficient for me to affirm the action of the trial court in denying the Rule 35 motion but, as convinced as I am that *Ewing* was improperly decided, I advance my views as to the more important question of whether Rule 35(b) is an integral part of the sentencing process or, as I believe, whether it is merely an integral part of the post-sentencing remedies available under Rule 35(b).

Order Denying Petition for Rehearing

**ORDER DENYING PETITION FOR
REHEARING DATED NOVEMBER 18, 1982**

(Filed: November 18, 1982)

Before: EDWARDS: Chief Judge; ENGEL, Circuit Judge;
and HOFFMAN, Senior District Judge*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

* Honorable Walter E. Hoffman, Senior Judge, U.S. District Court for the Eastern District of Virginia, sitting by designation.